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Issue Date: 28Sep2000

CASE NO.: 1999-BLA-00364

In the Matter of

BARBARA HACKNEY (widow of
Everett Edmond Hackney)
Claimant

v.

COLEMAN & YATES COAL COMPANY, INC./
VIRGINIA PROPERTY AND CASUALTY
INSURANCE GUARANTEE ASSOCIATION
Employer/Carrier

and

D.O. & W. COAL COMPANY/
OLD REPUBLIC INSURANCE COMPANY
Employer/Carrier

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Joseph E. Wolfe, Esquire (Wolfe & Farmer), Norton, Virginia, for the Claimant

Lucy G. Williams, Esquire (Street, Street, Street, Scott & Bowman), Grundy, Virginia, for D.O. & W. Coal Co. and Old Republic Insurance Co.

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER DENYING SURVIVOR'S BENEFITS

I. Statement of the Case

This case is before me pursuant to a request for hearing filed by the D.O. & W. Coal Co. (D.O. & W.) and its insurance carrier, Old Republic Insurance Co. (Old Republic) in connection with a claim for survivor's benefits filed by Barbara Hackney (the Claimant) under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act), and the regulations issued thereunder which are found at 20 C.F.R. Ch. VI, Subch. B (the Regulations). The Act provides for the payment of benefits to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, and to the survivors of a coal miner whose death is due to pneumoconiosis. 30 U.S.C. §901(a). Pneumoconiosis, commonly known as black lung, is a chronic disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. §902(b). The Regulations provide that any party to a claim under the Act has a right to a hearing on any contested issue of fact or law that is not resolved through informal administrative proceedings. 20 C.F.R. §725.450.

The Claimant's husband, Everett Edmond Hackney, filed a claim for benefits under the Act with the Department of Labor, Office of Workers' Compensation Programs on January 23, 1981. Director's Exhibit DX 27-1.[1] The OWCP denied this claim on June 2, 1981, and Mr. Hackney did not pursue the matter further at the time. DX 27-3. He did, however, file a second claim on January 19, 1988. DX 28-1. The OWCP determined that he had not shown a material change in conditions, and it dismissed this claim pursuant to 20 C.F.R. §725.309(d).[2] DX 28-13. Mr. Hackney appealed and, after a hearing was conducted, Administrative Law Judge Stuart A. Levin issued a decision and order on July 7, 1993 which awarded benefits to be paid by the Coleman & Yates Coal Company

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[1]The documentary evidence in this record is designated as "DX" for exhibits offered by the Director, OWCP, "CX" for exhibits offered by the Claimant and "EX" for exhibits offered by D.O. & W. and Old Republic. References to the hearing transcript will be designated "TR".

[2] Section 725.309(d) in pertinent part provides that, where a miner's claim is finally denied, a later claim must be denied on the same grounds as the prior denial unless it is determined that there has been a material change in conditions or that the later claim is a request for modification and that the requirements of section 725.310 are met. Section 725.310(a) of the Regulations provides that the Deputy Commissioner, OWCP (also referred to as the District Director; *see* 20 C.F.R. §725.101(a)(11)) may, upon his or her initiative or at the request of a party, reconsider the terms of an award or denial of benefits on grounds of a change in conditions or because of a mistake in a determination of fact at any time before one year from the date of last payment of benefits or before one year after the date of a denial.

(Coleman & Yates).[3] DX 28-75. Judge Levin found that the parties agreed that Mr. Hackney had compiled seven years of coal mine employment while working for Coleman & Yates and that he had 81 quarters or more than 20 years of additional coal mine employment. Decision and Order at 1. Judge Levin further found that the x-ray evidence, on balance, was negative for the presence of pneumoconiosis but that the evidence of record was sufficient to establish that Mr. Hackney had a totally disabling respiratory or pulmonary impairment. Decision and Order at 2-3. Judge Levin next addressed the etiology of this impairment and, finding the evidence with respect to this issue was contrary and equally probative, applied the "true doubt" rule to resolve the conflict in Mr. Hackney's favor by finding that a portion of the impairment was due to pneumoconiosis. Decision and Order at 4-11. Finally, Judge Levin concluded that because the Claimant had established the presence of pneumoconiosis, he was entitled to the presumption under 20 C.F.R. §718.203(b) that his pneumoconiosis arose out of coal mine employment. Decision and Order at 11-12. Coleman & Yates appealed to the Benefits Review Board (BRB) which affirmed Judge Levin's finding that Mr. Hackney had established that he was totally disabled but vacated his findings regarding the presence of pneumoconiosis, the etiology of pneumoconiosis and the cause of total disability because he had relied upon the true doubt rule which the Supreme Court invalidated in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). *Hackney v. Coleman & Yates Coal Co.*, BRB No. 93-1826 BLA (November 17, 1994) (unpublished); DX 28-88. The Board also held that Coleman & Yates argued correctly that Judge Levin erred in failing to weigh Dr. Abernathy's opinion, in failing to acknowledge Dr. Sargent's status as a treating physician, and in failing to resolve adequately the conflict between Dr. Robinette's opinion and the physicians' opinions submitted on behalf of Coleman & Yates. Slip op. at 3. Finally, the BRB held that Mr. Hackney had established a material change in conditions pursuant to 20 C.F.R. §725.309(d) as a matter of law inasmuch as the record contained evidence which, if fully credited, would establish the existence of pneumoconiosis, one of the elements of entitlement previously adjudicated against him. Slip op. at 5, n. 6.

On remand, Judge Levin determined that the opinions of Drs. Robinette and Sutherland were sufficient to establish that Mr. Hackney was suffering from pneumoconiosis as defined in 20 C.F.R. §718.201, that the presumption that his pneumoconiosis arose out of coal mine employment pursuant to section 718.203(b) had not been rebutted, and that Mr. Hackney had established that he was totally disabled due to pneumoconiosis pursuant to section 718.204(b). Accordingly, he again awarded benefits to Mr. Hackney. DX 28-89. In weighing the medical evidence, he gave little weight to the opinions offered on behalf of Coleman & Yates as he found that their opinions to the effect that coal dust exposure can not cause the purely obstructive lung disease were contrary to the Act based on the decision of the Fourth Circuit in *Eagle v. Armco, Inc.*, 943 F.2d 509 (1990). Decision and Order upon Remand at 7-8. Coleman & Yates appealed to the BRB which vacated Judge Levin's findings, this time because he did not have an opportunity to consider two decisions of the Fourth Circuit which

[3] Coleman & Yates had been named by the OWCP as the responsible operator in this claim. D.O. & W. and Old Republic were not parties in this case.

issued subsequent to *Eagle* – namely, *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (1995) and *Stiltner v. Island Creek Coal Co.*, 86 F.3d 377 (1996). *Hackney v. Coleman & Yates Coal Co.*, BRB No. 95-2131 BLA (September 12, 1996) (unpublished); DX 28-103, slip op. at 4. The BRB also vacated its prior holding that Mr. Hackney had established a material change as a matter of law because the Fourth Circuit had adopted a different standard for determining whether a material change had occurred in *Lisa Lee Coal Mines v. Director, OWCP*, 86 F.3d 402 (1995). Slip op. at 4-5. Following this second remand, Judge Levin issued a decision and order–awarding benefits on remand on June 12, 1997. DX 28-104. In this decision, Judge Levin reconsidered the evidence pursuant to the Board's instructions again found that the opinions offered by Coleman & Yates were deserving of little weight. Accordingly, he once again held that Mr. Hackney had established total disability due to pneumoconiosis arising out of his coal mine employment, and he ordered Coleman & Yates to pay Mr. Hackney all benefits to which he was entitled under the Act commencing as of January 1988. Decision and Order at 4-5. No appeal from this decision was taken, and the Virginia Property & Casualty Insurance Guaranty Association (VPCIGA), acting as the guarantor in liquidation of the Rockwood Insurance Company (Rockwood) which had insured Coleman & Yates for benefit liability under the Act, paid the benefits awarded. DX 28-107, 28-108.

Mr. Hackney died on May 18, 1997. DX 6. His widow, Barbara Hackney (the Claimant), filed a claim for survivor's benefits under the Act on June 3, 1998. DX 1. The District Director issued notification on June 19, 1998 to both D O & W and Coleman & Yates that they had been identified as responsible operators. DX 10, 11. In a letter dated June 26, 1998, VPCIGA notified the OWCP that Rockwood, the insurance carrier for Coleman & Yates, had been declared insolvent August 26, 1991 and that VPCIGA was prohibited under Virginia law from defending the claim because it was filed after the time set by the court in the Rockwood liquidation proceedings for the filing of claims against the liquidator or receiver of the insolvent insurer. DX 12. On October 28, 1998, the District Director notified both Coleman & Yates and D O & W that it had been initially determined that the Claimant is entitled to survivor's benefits. DX 22, 23. Old Republic, as the carrier for D O & W, contested liability and requested a hearing before an administrative law judge. DX 24. VPCIGA also filed an operator's controversion on behalf of Coleman & Yates. DX 20. The claim was forwarded to the Office of Administrative Law Judges (OALJ) for hearing on December 17, 1998. DX 29.

Upon referral to OALJ, the case was assigned to Administrative Law Judge Joseph E. Kane who scheduled a hearing for May 19, 1999. The Claimant, D O & W, and Old Republic appeared before Judge Kane at that time, and counsel for the Claimant moved for a continuance to permit further evidentiary development regarding the license status of one of the physicians who had rendered an opinion. Judge Kane granted the Claimant's unopposed motion. The matter was then reassigned to me, the hearing was rescheduled to October 6, 1999 in Abingdon, Virginia. Appearances were made by the Claimant and by D O & W, and Old Republic. No appearance was made by Coleman &

Yates, Rockwood Insurance Company or the VPCIGA.[4] At the hearing, the Claimant offered a narrative statement which was admitted in lieu of testimony without objection by opposing counsel. CX 1; TR 12-13.[5] Documentary evidence offered by
D O & W and Old Republic was admitted without objection as EX 2-6 and 8-12. TR 10-11. The Claimant objected to Employer's exhibits EX 1 and EX 7, a report and deposition testimony of Dr. Jerome Kleinerman, on the ground that Dr. Kleinerman had testified that he worked in Florida but was not licensed to practice in that jurisdiction, and I took the Claimant's objection under advisement. TR 10-11. I also took under advisement a motion filed by D O & W and Old Republic, and joined by the Claimant, to dismiss D O & W and Old Republic as parties on the ground that Coleman & Yates is the responsible operator. TR 6-8, 14-15. Finally, I deferred ruling on the admission of the documentary evidence referred by the District Director to OALJ to afford counsel to the Claimant an opportunity to review this evidence and raise any objection, and I granted the Claimant's request that the parties be allowed 60 days to file written closing argument. TR 9, 14.[6]

On March 9, 2000, I issued an order providing Coleman & Yates, Rockwood and VPCIGA an opportunity to show cause why their failure to appear at the hearing is excusable and should not result in a determination that each of these parties had waived its right to present evidence pursuant to 20 C.F.R. §725.461(b). By letter dated March 14, 2000, VPCIGA responded that Coleman & Yates was insured by Rockwood which was found insolvent on August 26, 1991; that by law, all claims were to be filed by August 26, 1992; that VPCIGA was not represented at the hearing because it can neither indemnify nor defend claims filed after August 26, 1992; and that it has been VPCIGA's experience that the Department of Labor has accepted the time bar when cases have been heard in the greater Virginia area. VPCIGA's letter concluded with the following request: "If you still cannot accept the time bar, please advise in writing and consider this letter a request for a sixty day extension to secure local counsel." By order dated March 21, 2000, VPCIGA was granted until May 22, 2000 to secure counsel and to offer any evidence and argument in support of its position. On May 22, 2000, counsel for VPCIGA entered an appearance and filed a written argument in response to the order to show cause. No request to file an answer in response to VPCIGA's argument was received, and the record was closed after Claimant submitted her narrative statement.

After careful consideration of the entire record in this matter which consists of the evidence introduced and the arguments advanced by the parties, I have concluded that Coleman & Yates is the proper responsible operator, that D O & W and Old Republic are entitled to be dismissed, and that the

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[4] The Director, OWCP also did not appear at the hearing, having previously filed notice that it did not intend to appear as it believed that the responsible operator had been properly identified.

[5] The Claimant did not have a copy of her narrative statement at the hearing, so her counsel was granted leave to submit the statement post-hearing. TR 13.

[6] Neither party submitted a post-hearing closing argument.

Claimant has not established that Mr. Hackney's death was due to pneumoconiosis. Consequently, her claim must be denied. My findings of fact and conclusions of law are set forth below.

III. Findings of Fact and Conclusions of Law

A. The Applicable Law

Since the survivor's claim for benefits was filed after March 31, 1980, the regulations found at 20 C.F.R. Part 718 are applicable. 20 C.F.R. §718.2; *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981). In addition, the decisions of the United States Court of Appeals for the Fourth Circuit are controlling as Mr. Hackney's coal mine employment occurred within that circuit in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989). As the proponent of benefits, the Claimant has the burden of proving all necessary elements by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 279-80 (1994).

B. Rulings on Admission of Evidence

No objection has been raised to any of the documentary evidence referred by the District Director to OALJ. Accordingly, these documents have been admitted as Director's Exhibits DX 1-31 pursuant to 20 C.F.R. §725.456(a).

The Claimant also objected to the report and deposition testimony of Dr. Kleinerman on the ground that he testified that he worked in Florida but was not licensed to practice medicine in that state. Although counsel was granted leave to further develop this issue and to file a post-hearing closing argument, no additional evidence or argument was offered. The record shows that Dr. Kleinerman submitted a report at the request of counsel to D O & W and Old Republic which included his review of Mr. Hackney's medical records and autopsy slides. EX 1. The report is on letterhead bearing an address in Palm Beach Gardens, Florida, and it appears to be undisputed that Dr. Kleinerman performed his review in the State of Florida. At his deposition, Dr. Kleinerman testified under cross-examination by counsel to the Claimant that he is licensed to practice medicine in Ohio but not in Florida. Dr. Kleinerman also denied that he practices medicine in Florida. EX 7 at 29-31. As the Claimant has made no showing that Dr. Kleinerman's review of medical records and autopsy slides and his preparation of a report containing his opinions constitutes unlicensed practice of medicine in violation of Florida law, I overrule the objection to his report and deposition testimony, and this evidence has been admitted as Employer's Exhibits EX 1 and 7.

C. Motion to Dismiss D O & W and Old Republic

D O & W and Old Republic contend that D O & W is not the responsible operator in this matter because the evidence establishes that Mr. Hackney's last coal mine employment of not less than one year was with Coleman & Yates. Under the Act, liability is assessed against the most recent operator to have employed a miner for cumulative periods of not less than one year, provided that the operator meets all of the regulatory requirements for designation as responsible operator including financial ability to assume liability for benefits. *Cole v. East Kentucky Collieries*, 20 BLR 1-51, 1-57 (1996). The evidence of record clearly shows that Mr. Hackney's last coal mine employment was with Coleman & Yates from February 1983 to June 1987 when he stopped work. DX 3, 9, 28-2, 28-3, 28-4, 28-72 (Transcript of January 12, 1993 hearing at 18-19). Indeed, Coleman & Yates conceded in is post-hearing brief to Judge Levin that "[a]ll of the available evidence indicates that Coleman & Yates Coal Company was the last coal mining employer for whom the claimant had one year or more of cumulative coal mining employment and is the responsible operator in this case." DX 28-74 at 3. The District Director similarly concluded in processing the instant survivor's claim that Coleman & Yates is "clearly the responsible operator" and stated that it named D O & W as another putative operator because VPCIGA was contesting liability. DX 9 at 1. Although the record shows that Rockwood, the carrier for Coleman & Yates, is insolvent and that its guarantor, VPCIGA, is contesting its liability, there is no evidence in the record concerning the current status of Coleman & Yates or whether it has reachable assets sufficient to cover its liability for survivor's benefits.[7] On this record where the Director has not developed evidence regarding the miner's most recent employer, I find that Coleman & Yates is the responsible operator for the survivor's claim and that D O & W and Old Republic are entitled to be dismissed as parties to this matter. *See Director v. Trace Fork Coal Company*, 67 F.3d 503, 507-8 (1995) (*Matney*); *England v. Island Creek Coal Co.*, 17 BLR 1-141, 1-143 (1993) (*England*).

D. Timeliness of the Claim

In the operator's controversion filed on behalf of Coleman & Yates, VPCIGA disputes whether the claim was timely filed. DX 20. Initial claims by or on behalf of a miner must be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner or March 1, 1978,

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[7] The Regulations at 20 C.F.R. §725.492(a)(4), in relevant part, states that a responsible operator or shall be capable of assuming its liability for the payment of continuing benefits through any of the following means:

> (i) By obtaining a policy or contract of insurance under section 423 of the Act and part 726 of this subchapter; or
> (ii) By qualifying as a self-insurer under section 423 of the Act and part 726 of this subchapter; or
> (iii) By possessing any assets that may be available for the payment of benefits under this part or through an action under subpart H of this part.

whichever is later. 30 U.S.C. § 932(f); 20 C.F.R. §725.308(a); *Andryka v. Rochester and Pittsburgh Coal Co.*, 14 BLR 1-34, 1-37 (1990). However, there is no time limit for a survivor's claim. 20 C.F.R. §725.308(a) ("There is no time limit on the filing of a claim by the survivor of a miner."). Accordingly, I find that the claim for survivor's benefits in this matter was timely filed under the Act.

VPCIGA also argues that the survivor's claim was not filed within the applicable time limits to be considered a "covered claim" which VPCIGA is obligated to pay under Virginia insurance law. VPCIGA Argument at 3-4. In this regard, VPCIGA points out that the Virginia insurance statute explicitly provides that "a covered claim shall not include any claim filed with the Guaranty Association after the final date set by the Court for the filing of claims against the liquidator or receiver of an insolvent insurer." *Id*. at 4, quoting Va. Code Ann §38.2-1606(A)(1). VPCIGA further argues,

> The Commonwealth Court of Pennsylvania set that date as August 26, 1992. Mrs. Hackney did not file her claim until 1998. Therefore, her claim is not a "covered claim" under Virginia law and the Guaranty Association has no obligation or authority to pay any award entered against Coleman & Yates.

Id. at 4. VPCIGA's argument raises two issues – first, whether the date of August 26, 1992 which was set in this case by the Pennsylvania Insurance Commissioner, acting as court-appointed liquidator of Rockwood, not by the court *per se*, qualifies as a claim cut-off date for purposes of Va. Code Ann §38.2-1606(A)(1) and second, whether the Claimant's survivor's claim may be deemed covered by section 38.2-1606(A)(1) because VPCIGA was on notice prior to August 26, 1992 of Mr. Hackney's January 1988 claim which resulted in an award of benefits. However, inasmuch as I have concluded that the evidence does not establish entitlement to survivor's benefits, it is not necessary to address these issues or to determine whether VPCIGA may be held liable, as guarantor of Rockwood, for any benefits awarded to the Claimant.

E. The Merits

The sole issue raised by Coleman & Yates and VPCIGA with respect to the Claimant's entitlement to survivor's benefits is whether Mr. Hackney's death was due to pneumoconiosis. DX 20. The evidence of record bearing on the cause of Mr. Hackney's death is summarized below.

J.G. Patel, M.D. completed Mr. Hackney's death certificate as the attending physician and listed cardiopulmonary arrest due to acute respiratory failure due to COPD (chronic obstructive pulmonary disease as the immediate cause of death and hypoxemia[8] as another significant condition contributing to death. DX 6. Hospital records indicate that Mr. Hackney was admitted to the Buchanan General Hospital in Grundy, Virginia on May 16, 1997 with complaints of shortness of

[8] Hypoxemia is a reduction of oxygen supply to tissue below physiological levels despite adequate perfusion of the tissue by blood. Dorland's Illustrated Medical Dictionary (28th Ed. 1994) at 812.

breath, generalized weakness and palpitations. DX 21 at 10. In a posthumous report, Dr. Patel listed the following as Mr. Hackney's final diagnoses: (1) acute respiratory failure; (2) hypotension; (3) atrial fibrillation with fast ventricular response; (4) multiple premature ventricular contractions, transient; (5) chronic obstructive pulmonary disease with exacerbation; (6) pre-renal azotemia; (7) anemia; (8) chronic dyspepsia; and (9) benign prostatic hypertrophy by history. *Id*. at 8. Dr. Patel's qualifications are not contained in the record.

Jose Abrenio, M.D. conducted an autopsy at the Claimant's request on May 18, 1997. DX 7. On gross examination of the lungs, Dr. Abrenio noted moderate to almost severe panacinar emphysema and multiple macules on the pleural surfaces characterized by dark, anthracotic discoloration varying in size from 0.1 to 0.6 cm in diameter. *Id.* at 2. On microscopic examination of the lung tissue, Dr. Abrenio again reported the presence of moderate to almost extensive panacinar emphysema. He stated that the emphysema was characterized by multiple bulla-like formations with extensive interstitial fibrosis. He also reported finding numerous macules made up of aggregates of pigment-laden macrophages in a background of fibrosis, many of which were located around bronchioles or small to medium size blood vessels. Overall, his findings were panacinar emphysema, as opposed to centrilobular type emphysema, with massive fibrosis. *Id.* at 3. His final anatomic diagnosis was (1) complicated coal worker's pneumoconiosis, (2) severe panacinar emphysema, (3) necrotizing bronchopneumonia with pulmonary intra-alveolar hemorrhages, (4) bilateral pleural fibrous adhesions, (5) moderate to severe atherosclerosis with calcification of the left and right coronary arteries. *Id*. In conclusion, Dr. Abrenio stated, " The patient died from aspiration necrotizing bronchopneumonia. The lungs also showed the presence of coal workers' complicated pneumoconiosis." *Id*. at 4. Dr. Abrenio's qualifications are not contained in the record.

Mr. Hackney's treating physician from 1983, J.P. Sutherland, Jr., D.O., addressed the cause of his patient's death in a letter to the Claimant dated June 16, 1997. In his letter, Dr. Sutherland stated that Mr. Hackney's severe lung disease, both restrictive and obstructive, was the direct result of multiple years of exposure to coal dust. He further stated that he had reviewed the autopsy report which confirmed the presence of complicated pneumoconiosis and emphysema. He stated that it was his opinion that Mr. Hackney had severe restrictive and obstructive lung disease as a direct result of pneumoconiosis and anthracosis. Based upon his review of the autopsy report and his numerous physical examinations, Dr. Sutherland stated that it also was his opinion that Mr. Hackney's lung disease caused pulmonary hypertension with severe bronchospasm which led to his death. DX 8. Finally, Dr. Sutherland concluded that Mr. Hackney's severe lung disease was the primary cause of his disability as well as a major contributing factor to his death. DX 8. Dr. Sutherland's qualifications are not contained in the evidence of record.

In a letter dated February 4, 1999 to the attorney for D O & W and Old Republic, Dr. Kleinerman reported his findings and opinions based on a review of medical records, including the autopsy report, a copy of the death certificate and 15 slides of tissue removed at autopsy. EX 1. Dr. Kleinerman concluded that Mr. Hackney had simple coal worker's pneumoconiosis of moderate to marked extent, no evidence of complicated pneumoconiosis, and severe panacinar emphysema which he attributed to prolonged and extensive cigarette smoking. *Id*. at 7. He further concluded that Mr.

Hackney's pneumoconiosis did not in any way cause, contribute to or hasten his death:

> The most severe and extensive pathologic lesion in the lung is the extensive and severe panacinar emphysema. Panacinar emphysema is recognized to result from heavy and prolonged cigarette smoking. Mr. Hackney had a history of up to 90 pack years of cigarette smoking. This amount and duration of cigarette smoke inhalation is documented in the report of the Surgeon general of the U.S. in 1964 and in years thereafter to be the major cause of panacinar emphysema, centriacinar emphysema , Chronic Bronchitis, and severe coronary atherosclerosis and myocardial infarction. In my opinion and with reasonable medical certainty, Mr. Hackney's exposure to coal mine dust did not in any way cause of [sic] contribute to the development of the panacinar emphysema.
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> Mr. Hackney appears to have died as a result of respiratory failure with carbon dioxide narcosis and hypotension. In my opinion Mr. Hackney's exposure to coal mine dust and his moderate to marked CWP did not in any way cause, contribute to, or hasten his death.

Id. Dr. Kleinerman also testified concerning his report and opinions at a deposition taken May 14, 1999. EX 7. He stated that the 0.1 to 0.6 cm macules described by Dr. Abrenio in the autopsy report were not supportive of a finding of complicated pneumoconiosis and that there was no other evidence in the autopsy report or in his own examination of the autopsy slides to indicate that Mr. Hackney's pneumoconiosis should be classified as complicated. *Id*. at 51-52. Dr. Kleinerman also reiterated his opinion that Mr. Hackney's respiratory death was the result of cigarette smoking. EX 7 at 60. Regarding the role played by Mr. Hackney's pneumoconiosis, Dr. Kleinerman stated on cross-examination that, although it is possible that the condition of Mr. Hackney's lungs might have improved if he did not suffer from pneumoconiosis, it was his opinion that the pneumoconiosis would not have made any significant difference in the causation or time of his death. *Id.* at 64. Dr. Kleinerman's *curriculum vitae* reflects that he is board-certified in anatomical and clinical pathology. EX 2.

D O & W and Old Republic also submitted a pathology report dated February 28, 1999 from Echols A. Hansbarger M.D. In his report, Dr. Hansbarger reviewed Mr. Hackney's medical records, including the autopsy report and slides, and agreed that Mr. Hackney had simple coal worker's pneumoconiosis. He found no evidence of complicated pneumoconiosis or progressive massive fibrosis, and he concluded that Mr. Hackney died as a result of atherosclerotic coronary heart disease and chronic obstructive pulmonary disease with acute cardiopulmonary failure. Dr. Hansbarger further concluded that, based upon the moderate nature of Mr. Hackney's pneumoconiosis, his death "was [not] hastened in any way shape or form" by pneumoconiosis. Dr. Hansbarger's *curriculum vitae* reflects that he is board-certified in anatomical and clinical pathology. EX 4.

In addition to the pathology reports from Drs. Kleinerman and Hansbarger, D O & W and Old Republic submitted consultative reports from two specialists in pulmonary disease, Gregory J. Fino, M.D. and Ben V. Branscomb, M.D. In a letter dated April 29, 1999, Dr. Fino reviewed Mr.

Hackney's medical records, including the autopsy reports, and he discussed medical literature relating to pneumoconiosis and emphysema. EX 5. He concluded that coal worker's pneumoconiosis played no role in Mr. Hackney's death and did not hasten his death, and he stated that Mr. Hackney "would have died as and when he did had he never stepped foot in the mines." *Id*. at 41. Dr. Fino reiterated his opinions in his deposition testimony and expressed his opinion that Mr. Hackney's respiratory death was the result of cigarette smoking and had nothing to do with his history of employment as a coal miner. EX 11 at 17. Dr. Fino is board-certified in internal medicine with a subspecialty in pulmonary disease, and he is a certified B-reader. EX. 6. Dr. Branscomb concluded from his review of the medical records that "there is not one shred of detectible difference in the clinical findings, clinical course, treatment, and ultimate events in Mr. Hackney's case that differentiates him in any way from the course of bronchospasm and emphysema in the general population with his family history and cigarette history." EX 8 at 4. He further concluded that Mr. Hackney's simple coal worker's pneumoconiosis did not cause or hasten his death or aggravate any of his other conditions. *Id.* Dr. Branscomb reiterated his opinions in his deposition testimony and stated that Mr. Hackney's respiratory death was the result of cigarette smoking. EX 10 at 50. Dr. Branscomb's *curriculum vitae* reflects that he has been a Distinguished Professor Emeritus at the University of Alabama at Birmingham, and he was recognized by UAB with the creation of an endowed chair in 1990, the "Ben Vaughan Branscomb Professor of Medicine and Pulmonary Disease." He is board-certified in internal medicine and a certified B-reader, and he has published numerous professional articles on the diagnosis and treatment of lung diseases. EX 9.

Section 718.205(c) of the Regulations provides that for the purpose of adjudicating a survivor's claim filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if any one of the following criteria is met:

> (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 [relating to complicated pneumoconiosis] is applicable.

Section 718.205(c)(4) further provides that survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death. The record does not contain any medical evidence that Mr. Hackney's death was due to his pneumoconiosis, so the Claimant is unable to establish death due to pneumoconiosis pursuant to subsection (c)(1). However, there is evidence in the form of Dr. Sutherland's opinion that pneumoconiosis was a substantially contributing cause or factor in Mr. Hackeny's death which must be weighed against the contrary medical evidence at subsection (c)(2), and there is evidence of complicated pneumoconiosis in Dr. Abrenio's autopsy findings which must be weighed against the contrary medical evidence at subsection (c)(3). I will first address the question of

complicated pneumoconiosis.

Complicated Pneumoconiosis

Section 718.304 creates an irrebuttable presumption of total disability or death due to pneumoconiosis where a miner is suffering or suffered from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray yields one or more large opacities greater than one centimeter in diameter and classified as Category A, B, or C under one of three specified classification systems; (b) when diagnosed by biopsy or autopsy yields massive lesions in the lungs; or (c) when diagnosed by means other than those specified in (a) or (b) would be a condition which could reasonably be expected to produce the results described in (a) and (b). The presumption is not invoked by a single piece or category of evidence being positive for complicated pneumoconiosis; rather, all relevant evidence bearing on the existence of complicated pneumoconiosis must be weighed. *Lester v. Director, OWCP*, 993 F.2d 1143, 1146 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991). In weighing the relevant evidence, it is well-established that an autopsy provides the most reliable evidence pertaining to the existence of pneumoconiosis. *Terlip v. Director, OWCP*, 8 BLR 1-363, 1-364 (1985); *Fetterman v. Director*, OWCP, 7 BLR 1-688 (1985).

There is no x-ray diagnosis of pneumoconiosis under section718.304(a) and no other evidence of pneumoconiosis under section 718.304(c), and I find that the autopsy evidence of record is insufficient to establish the presence of complicated pneumoconiosis under section 718.304(b). Dr. Abrenio did not make any specific finding regarding the presence of "massive lesions" to support his conclusion that Mr. Hackney suffered from complicated pneumoconiosis. Further, Dr. Abrenio's only finding regarding the size of any lesions are his mention of macules measuring from 0.1 to 0.6 cm in diameter which, as Dr. Kleinerman correctly points out, are insufficient to support a diagnosis of complicated pneumoconiosis. *See Double B Mining, Inc. v. Director, Office of Workers' Compensation Programs*, 177 F.3d 240, 243 (4th Cir. 1999) (when complicated pneumoconiosis is diagnosed by biopsy rather than x-ray, it must be determined whether the biopsy results show a condition that would produce opacities of greater than one centimeter in diameter on an x-ray; that is "massive lesions" as described in subsection (b) are lesions that when x- rayed, show as opacities greater than one centimeter in diameter). Accordingly, I have given greater weight to the opinion from Dr. Kleinerman, which is supported by specific findings and by the report from Dr. Hansbarger, and I conclude that the presence of complicated pneumoconiosis has not been established. Consequently, the Claimant has not established death due to pneumoconiosis pursuant to sections 718.205(c)(3) and 718.304.

Pneumoconiosis as a Substantially Contributing Cause or Factor Leading to Death

For purposes of section 718.304(c)(2), pneumoconiosis is considered to be a substantially contributing cause or factor if it served to hasten death in any way. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80 (4th Cir. 1992) , *cert. denied*, 506 U.S. 1050 (1993). As discussed above, Dr. Sutherland stated that Mr. Hackney's severe restrictive and obstructive lung disease was the direct result of pneumoconiosis and

anthracosis. He further stated that, based upon his review of the autopsy report and his numerous physical examinations, it was his opinion that Mr. Hackney's restrictive and obstructive lung disease caused pulmonary hypertension with severe bronchospasm which led to his death and that Mr. Hackney's severe lung disease was a major contributing factor to his death. On the other hand, Drs. Kleinerman, Hansbarger, Fino and Branscomb all concluded that Mr. Hackney's death was caused by respiratory failure resulting from his severe emphysema which was caused by cigarette smoking and that pneumoconiosis did not cause, contribute to or hasten his death.

Dr. Sutherland's status as a treating physician is a factor which entitles his opinion to great, though not necessarily dispositive weight. *See Grigg v. Director, OWCP*, 28 F.3d 416, 420 (4th Cir. 1994); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1097 (4th Cir.1993); *Hubbard v. Califano*, 582 F.2d 319, 323 (4th Cir.1978). However, an ALJ may not mechanistically credit, to the exclusion of all other opinions, the opinion of an examining or treating physician solely because the doctor personally examined the claimant. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir.1997). Rather, the ALJ must determine whether the medical opinion is unsupported by sufficient rationale. *Milburn Colliery Co. v. Hicks*, 138 F. 3d 524, 532, n. 9 (4th Cir. 1998); *Fuller v. Gibraltar Corp.*, 6 BLR 1-1292, 1-1294 (1984). In this regard, the Fourth Circuit has instructed,

> In weighing opinions, the ALJ is called upon to consider their quality. Thus, the ALJ should consider the qualifications of the experts, the opinions' reasoning, their reliance on objectively determinable symptoms and established science, their detail of analysis, and their freedom from irrelevant distractions and prejudices. In addition, the ALJ should consider whether an opinion was, to any degree, the product of bias in favor of the party retaining the expert and paying the fee.

Underwood v. Elkay Mining, Inc., 105 F. 3d 946, 951 (4th Cir. 1998). After considering all of these factors, I am persuaded that the opinion from Dr. Sutherland is outweighed by the contrary opinions from Drs. Kleinerman, Hansbarger, Fino and Branscomb. First, and most importantly, I note that Dr. Sutherland relied in part on the mistaken belief that Mr. Hackney suffered from complicated pneumoconiosis which would have presumptively established that his death was due to pneumoconiosis. Second, his opinion does not contain any discussion of the objective medical evidence other than a reference to the autopsy report or reasoning to support his conclusions, while the opinions from Drs. Kleinerman, Hansbarger, Fino and Branscomb all discuss the medical evidence and present rationale in support of their conclusions. Finally, Drs. Kleinerman, Hansbarger, Fino and Branscomb are all well-qualified specialists in either pathology or pulmonary disease while Dr. Sutherland's only known, albeit significant, qualification is the fact that he treated Mr. Hackney for a period of several years. Based on this assessment, I find that a preponderance of the better reasoned and supported medical evidence does not establish that pneumoconiosis hastened Mr. Hackney's death in any way or that it otherwise was a substantially contributing cause or factor in his death. This determination does not mean that I am free from doubt regarding the reliability of the employer-sponsored opinions as none of these physicians in my view provided a particularly convincing rationale for their conclusion that Mr. Hackney's pneumoconiosis, which Dr. Kleinerman found to be moderate to marked in severity, played absolutely no role in his death from respiratory failure. Indeed, one

wonders from reading their reports whether Drs. Kleinerman, Hansbarger, Fino and Branscomb would ever find pneumoconiosis, other than the complicated variety, to be contributory. Despite these doubts, I am persuaded that the opinions from Drs. Kleinerman, Hansbarger, Fino and Branscomb, on balance, are better reasoned and better documented that the letter from Dr. Sutherland offered by the Claimant. Accordingly, I conclude that the Claimant has not established death due to pneumoconiosis pursuant to sections 718.205(c)(2).

Having determined that the Claimant has not met her burden of establishing by a preponderance of evidence that the miner's death was due to pneumoconiosis, I conclude that her claim for survivor's benefits under the Act must be denied.

IV. Order

The survivor's claim filed by Barbara Hackney on September 19, 1997 is DENIED.

DANIEL F. SUTTON
Administrative Law Judge

Camden, New Jersey

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Francis Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, DC 20210.

ATTORNEY FEE

The award of an attorney's fee is permitted only in cases in which a claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to a claimant for representation services rendered in pursuit of the claim.